AND
BRIEFS

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IN THE

Supreme Court of the United States

JESUS C. HERNÁNDEZ, *et al.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE PROFESSOR GREGORY C. SISK IN SUPPORT OF NEITHER PARTY

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BRIEF OF AMICUS CURIAE PROFESSOR GREGORY C. SISK IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Professor Gregory C. Sisk holds the Laghi Distinguished Chair in Law at the University of St. Thomas (Minnesota). His only interest in this matter is that of a legal scholar studying the jurisprudence of federal sovereign immunity and statutory waivers.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* and its counsel made a monetary contribution to this brief's preparation or submission. Letters consenting to the filing of this brief are on file with the Clerk.

For more than a quarter of a century, Professor Sisk's scholarly work has focused on civil litigation with the federal government. He has published both a treatise and the only law school casebook on the subject. *Litigation With The Federal Government* (2016); *Litigation With The Federal Government: Cases and Materials* (2d ed. 2008 & 2015 Supp.). The treatise and the casebook each include a chapter devoted primarily to the Federal Tort Claims Act and a chapter on claims against federal officers including discussion of the Westfall Act and *Bivens*. Professor Sisk also has written several law review articles on federal sovereign immunity and the construction of statutory waivers of federal sovereign immunity.

Professor Sisk's scholarly publications on federal government litigation are cited regularly by the federal courts. *See, e.g.*, *United States* v. *Tohono O'odham Nation*, 563 U.S. 307, 314 (2011); *Barnes* v. *United States*, 776 F.3d 1134, 1144 (10th Cir. 2015); *Collins* v. *United States*, 564 F.3d 833, 836 (7th Cir. 2009); *Suburban Mortg. Assocs., Inc.* v. *HUD*, 480 F.3d 1116, 1123 n.12 (Fed. Cir. 2007); *Role Models Am., Inc.* v. *Brownlee*, 353 F.3d 962, 969 (D.C. Cir. 2004).

In addition to Professor Sisk's teaching and scholarly work, he continues to practice law, primarily on a pro bono basis. As a former appellate attorney with the Civil Division of the U.S. Department of Justice and now as a private attorney, Professor Sisk has litigated cases on behalf of both the Government and private parties under statutory waivers of federal sovereign immunity.

INTRODUCTION AND SUMMARY OF ARGUMENT

In addition to questions concerning the scope of Fourth Amendment protection and the nature of qualified immunity, this Court has asked the parties "[w]hether the claim in this case may be asserted under *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971)." Amicus writes to emphasize one important threshold consideration in resolving the *Bivens* question: the unavailability of an "'alternative, existing process for protecting the constitutionally recognized interest'" asserted by petitioners here. *Minneci* v. *Pollard*, 132 S. Ct. 617, 621 (2012) (quoting *Wilkie* v. *Robbins*, 551 U.S. 537, 550 (2007)) (brackets omitted).

This Court considers the availability of alternative remedy schemes as a threshold matter when evaluating whether an implied remedy under *Bivens* is available for the redress of constitutional wrongs. *Minneci*, 132 S. Ct. at 621. But in cases like this one, plaintiffs ordinarily cannot obtain a remedy under either the Federal Tort Claims Act or state tort law. Because neither FTCA nor state tort remedies are available, these remedy schemes cannot weigh against the availability of a *Bivens* claim here. Rather, *Bivens* is the only possible source of an adequate damages remedy for the extreme harm—the wrongful taking of a human life—at issue in this case.

FTCA claims are barred in several ways in cases like this one:

Most obviously, the FTCA excludes "[a]ny claim arising in a foreign country," 28 U.S.C. § 2680(k), which this Court has interpreted to apply to "all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred," *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). Given that

the fatal injury here was suffered across the border, the foreign country exception precludes FTCA liability even though the wrongful act occurred inside the United States.

Moreover, while not implicated in this case, the assault and battery exception ordinarily would bar an FTCA claim based on an intentional battery by a non-law-enforcement federal employee. 28 U.S.C. § 2680(h). This bar cannot be avoided by reframing a battery-based FTCA claim as one for negligent hiring, training, or supervision. *See Sheridan* v. *United States*, 487 U.S. 392, 406-408 (1988) (Kennedy, J., concurring in the judgment); *id.* at 410-411 (O'Connor, J., dissenting); *see also, e.g.*, *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (per curiam); *CNA* v. *United States*, 535 F.3d 132, 148-150 (3d Cir. 2008).

The FTCA thus provides no viable alternative to a *Bivens* remedy in cases like this, involving an alleged unjustified government killing.

State common-law tort remedies are also unavailable against an individual federal officer in most cases like this one. Under the Westfall Act, 28 U.S.C. § 2679(b)(1), the FTCA is the exclusive remedy for personal injury claims arising from a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." And an individual federal employee retains immunity from state tort-law liability under the Westfall Act even if the United States is also immune under an FTCA exception (for example, the foreign country exception that applies in this case, or the assault and battery exception that applies to many intentional torts). *See Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995).

In the Westfall Act context, the recent broadening of state law *respondeat superior* principles, which was intended to *expand* employer accountability for intentional wrongdoing by employees, thus has the paradoxical effect of immunizing from suit both federal employees and the federal government itself. *See* Sisk, *Litigation With The Federal Government* § 5.6(c)(4) (2016).

This case exemplifies the limited reach of state tort law considering the Westfall Act: Here, the government certified that Mesa was acting within the scope of employment as a United State Border Patrol agent when he shot the Hernándezes' teenage son, making Mesa immune from personal injury claims under state law. State-law personal injury suits thus also provide no viable alternative to a *Bivens* remedy in cases like this.

ARGUMENT

I. WHETHER A *BIVENS* REMEDY IS AVAILABLE MAY DEPEND ON THE EXISTENCE OF WELL-DEVELOPED, ADEQUATE ALTERNATIVES

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395-397 (1971), this Court held that a damages action will lie against federal agents, acting under color of federal authority, for their alleged violation of a plaintiff's constitutional rights. This Court grounded such claims in the basic proposition that there must be legal remedies for legal wrongs. *See id.* *Bivens* claims have been analogized to a federal version of claims under 42 U.S.C. § 1983, which authorizes suit against state officials acting under color of law. *See, e.g.*, Pfander & Baltmanis, *Rethinking* Bivens*: Legitimacy and Constitutional Adjudication*, 98 Geo. L.J. 117, 121-126, 137

(2009); Zaring, *Three Models of Constitutional Torts*, 2 J. Tort L. No. 3, at 4 (2008).[2]

Bivens is not without limitation. In *Bivens*, the Court reasoned that an implied claim for damages for violation of the plaintiff's Fourth Amendment rights could proceed in part because such a claim "involve[d] no special factors counseling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. For example, there was "no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the [government employee], but must instead be remitted to another remedy, equally effective in the view of Congress." *Id.* at 397.

In subsequent cases defining the limits of the *Bivens* remedy, the Court has thus considered whether the existence of alternate remedies weighs against the expansion of *Bivens* claims into new contexts. *See* Sisk, *Litigation With The Federal Government* § 5.7(c) (2016) (hereinafter, "Sisk, *Litigation*"). This Court has described a "two step[]" analysis: First, courts expressly consider "'whether any alternative, existing process for protecting the constitutionally recognized interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages'"; and second, they consider whether there are "any special factors counselling hesitation before authorizing a new kind of federal litigation." *Minneci* v. *Pollard*, 132 S. Ct. 617, 621 (2012) (quoting

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[2] Notably, Congress recognized the existence of *Bivens* remedies for violations of constitutional rights by federal actors when it passed the Westfall Act. 28 U.S.C. § 2679(b)(2)(A); *cf. Hui* v. *Castaneda*, 559 U.S. 799, 806-807 (2010) (noting Westfall Act's carveout of *Bivens* claims).

Wilkie v. *Robbins*, 551 U.S. 537, 550 (2007) (brackets and other internal quotation marks omitted)). Under this framework, the Court has limited the availability of *Bivens* remedies where there are well-developed, alternative remedy schemes, particularly in the administrative context.[3]

Minneci is illustrative. In that case, the Court declined to recognize a *Bivens* remedy for a federal prisoner who alleged inadequate medical care by privately employed prison staff in violation of the Eighth Amendment. The Court held that a *Bivens* remedy was unavailable because the plaintiff had a damages remedy for his alleged unconstitutional treatment under "roughly similar" state tort law. *Minneci*, 132 S. Ct. at 625. "Because ... state tort law authorizes adequate alternative damages actions," the Court would not imply a separate cause of action under *Bivens*. *Id.* at 620. What was "critical" in *Minneci* was that the defendant was a private employee, rather than a federal employee who would have been immune from suit in a state-law tort action. *Id.* at 623.

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[3] *See Wilkie*, 551 U.S. at 551-562 (claims under the Takings Clause of the Fifth Amendment could not support a *Bivens* remedy where there were other administrative and judicial remedies, including at the state level); *Schweiker* v. *Chilicky*, 487 U.S. 412, 425 (1988) (refusing to extend *Bivens* where comprehensive administrative process existed for social security beneficiaries); *Bush* v. *Lucas*, 462 U.S. 367, 375-380 (1983) (refusing to extend *Bivens* where comprehensive administrative process existed for aggrieved federal employees to contest management decisions). By contrast, here there is no congressionally created administrative remedy for cross-border shootings or similar acts of violence that might substitute for damages obtained in litigation.

Under the *Minneci* analysis,[4] there remain cases like this one, where plaintiffs have no alternative damages remedies that might weigh against the availability of a *Bivens* claim. Amicus submits that the unavailability of both FTCA claims and state common-law tort claims against an individual officer here means that these unavailable remedies cannot be considered as adequate alternatives or "special factors" that might counsel against the availability of a *Bivens* remedy. Indeed, this is the exact type of case where *Bivens* offers the only workable damages remedy for allegedly grievous violations of constitutional rights.

II. FTCA Remedies Are Unavailable In Cases Like This One

The claim in this case—that Mesa unjustifiably shot a teenage boy to death—is barred by the FTCA's foreign country exemption. 28 U.S.C. § 2680(k). Moreover, many similar claims that do not involve the foreign country exception will be barred by the FTCA's exception for certain intentional torts.

The FTCA, 28 U.S.C. § 1346(b), §§ 2671-2680, constitutes a "'sweeping'" waiver of the Federal Government's sovereign immunity. *E.g.*, *Dolan* v. *USPS*, 546 U.S. 481, 492 (2006). The FTCA was designed "to ren-

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[4] *Minneci* may represent a narrower view of *Bivens*, under which the existence of an adequate alternative remedy scheme in itself may bar the availability of a *Bivens* claim. *See, e.g.* Reinert & Mulligan, *Asking the First Question: Reframing* Bivens *After* Minneci, 90 Wash. U. L. Rev. 1473, 1477 (2013) (arguing that, before *Minneci*, the Court had considered the existence of state-law remedies as part of a holistic inquiry, rather than a categorical reason to decline to recognize a *Bivens* action); *see also Minneci*, 132 S. Ct. at 627 (Ginsburg, J., dissenting); *Carlson* v. *Green*, 446 U.S. 14, 23 (1980) (availability of alternative remedy not dispositive).

der the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States*, 369 U.S. 1, 6 (1962); *see also* 28 U.S.C. § 2674.

However, the government explicitly retained its immunity from suit for certain types of tort claims and for certain governmental activities, by including express statutory exceptions in the FTCA itself. 28 U.S.C. § 2680; *see also, e.g.*, *Richards*, 369 U.S. at 6. In a manner akin to an affirmative defense, such exceptions foreclose a tort remedy against the United States even when the individual tortfeasor was acting within the scope of federal employment and the pleadings otherwise state a cognizable tort claim under state law. *See* Sisk, *Litigation*, § 3.6(a).

One of those exceptions—the "foreign country" exception—unambiguously applies here. Another—the "assault and battery" exception—will apply in many circumstances like those alleged here. The FTCA thus provides no remedy for a category of serious harms like those asserted in this case, including the most severe harm imaginable: loss of human life.

A. The FTCA Provides No Remedy Where, As Here, The Injury Is Suffered In A Foreign Country

1. The foreign country exception to the FTCA excludes "[a]ny claim arising in a foreign country." 28 U.S.C. § 2680(k).

Because liability under the FTCA is governed by the "law of the place where the act or omission occurred," 28 U.S.C. § 1346(b)(1), the most obvious function of the foreign country exception is to insulate the United States from liability based on foreign law when the tort occurs outside the borders of the United

States. Sisk, *Litigation*, § 3.6(e). However, as this Court has made clear, § 2680(k) is not limited to only those circumstances in which foreign law would apply.

In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 700-712 (2004), the Court held that the foreign country exception applied where an injury suffered in another country had been caused by tortious wrongdoing within the United States. Under *Sosa*, the foreign country exception applies to "all claims based on any *injury suffered in a foreign country*, regardless of where the tortious act or omission occurred." *Id.* at 712 (emphasis added). It is thus the locus of the injury that matters for purposes of the foreign country exception. *See* Cisneros, Note, Sosa v. Alvarez-Machain—*Restricting Access to US Courts Under the Federal Tort Claims Act and the Alien Tort Statute: Reversing the Trend*, 6 Loy. J. Pub. Int. L. 81, 92 (2004).

2. *Sosa* involved a DEA mission to kidnap, capture, and render to the United States a Mexican national who had been indicted in the torture and murder of a DEA agent. 542 U.S. at 697-698. After trial, the suspect was acquitted. *Id.* at 698. Upon his return to Mexico, the suspect brought a civil suit against a Mexican national named Jose Sosa who had participated in the mission in conjunction with the DEA and against the United States Government. *Id.* at 698-699. Alvarez-Machain's claim against the United States rested, in relevant part, on an FTCA claim of false arrest.[5] *Id.* at 698.

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[5] Importantly, once Alvarez-Machain was in the United States, his detention was no longer tortious, *see Alvarez-Machain* v. *United States*, 331 F.3d 604, 636-637 (9th Cir. 2003), *rev'd by Sosa*, 542 U.S. 692, since he was at that point under arrest for the alleged murder of the DEA agent. Alvarez-Machain's claim was

This Court held that the foreign country exception to the FTCA applied because the alleged tortious conduct was "most naturally understood as the kernel of a claim arising in a foreign country." *Sosa*, 542 U.S. at 701. It rejected the so-called "headquarters doctrine," under which the availability of the foreign country exception hinges on where the tortious *act* occurred, as opposed to the location of the injury. *See, e.g.*, *Sami* v. *United States*, 617 F.2d 755, 762 (D.C. Cir. 1979) (finding FTCA liability "for acts or omissions occurring [in the United States] which have their operative effect in another country"), *abrogated by Sosa*, 542 U.S. at 710 n.8. Rather, the Court applied a *lex loci delicti* rule, similar to the traditional choice-of-law rule at the time of the FTCA's passage. *Sosa*, 542 U.S. at 704-705.[6]

3. Under *Sosa*'s locus of the injury test, the foreign country exception would preclude an FTCA claim here. Because Hernández was shot in Mexico, it does not matter that Agent Mesa was standing in the United States when he pulled the trigger. The foreign country exception still applies, leaving Hernández's estate with no claim against the United States under the FTCA.

That was the holding of the District Court here in its dismissal of FTCA claims brought by the petitioners. Pet. App. 132-133. It was also the holding in an-

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based on his kidnapping and detention in Mexico. *Sosa*, 542 U.S. at 700-701.

[6] Justice Ginsburg, joined by Justice Breyer, would have held the foreign country exception applicable under a narrower "last significant act or omission" test. *Sosa*, 542 U.S. at 759-760 (Ginsburg, J., concurring in part and concurring in the judgment). That test might still foreclose FTCA liability in this case, as the completion of the tort occurred when the bullet struck the decedent on the Mexican side of the border.

other, virtually identical cross-border shooting case. *See Ortega-Chavez* v. *United States*, 2012 WL 5988844, at *2 (S.D. Cal. Nov. 29, 2012) (dismissing shooting victim's FTCA claim and holding that despite the tortious activity occurring in the United States, "domestic proximate causation does not eliminate application of the foreign country exception"). Other courts applying *Sosa* have reached the same result.[7]

Sosa is clear: The foreign country exception exempts from the FTCA's sovereign immunity waiver all claims based on injuries that were suffered abroad, regardless of where the tortious activity took place. The FTCA does not provide an alternative remedy in this case.

B. The FTCA Also Provides No Remedy For Most Assault And Battery Claims

1. While it does not apply in this case, another FTCA exception for intentional tort claims would also bar many claims like those asserted here, even where the locus of the alleged injury is the United States.

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[7] *E.g.*, *Agredano* v. *United States Customs Service*, 223 F. App'x 558, 558-559 (9th Cir. 2007) (foreign country exception immunized United States from suit arising from arrest and imprisonment that took place in Mexico); *Thompson* v. *Peace Corps*, 159 F. Supp. 3d 56, 60-62 (D.D.C. 2016) (foreign country exception barred claims brought by former Peace Corps volunteer alleging injuries suffered abroad but caused by anti-malarial drugs given to him by the Peace Corps); *Padilla* v. *United States*, 2007 WL 2409792, at *7-8 (W.D. Tex. Aug. 20, 2007) (applying *Sosa* rule to case where individual was killed in Mexico, even though he was abducted from his home in the United States); *Harbury* v. *Hayden*, 444 F. Supp. 2d 19, 23 (D.D.C. 2006) (action alleging torture and murder by CIA agents was barred by foreign country exception).

The FTCA excludes "[a]ny claim arising out of assault[or] battery." 28 U.S.C. § 2680(h). This exception, commonly referred to as the "assault and battery" exception, also excludes "false imprisonment, false attest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." *Id.* The Government thus retains its sovereign immunity as to "a very considerable portion of the law of torts." 2 Jayson & Longstreth, *Handling Federal Tort Claims*, § 13.06[1][a] (2014); *see also id.* § 13.06[1][b].

This exception would not apply here because it is itself subject to the so-called "law enforcement proviso," which waives the Government's sovereign immunity for an assault or battery based on "acts or omissions of investigative or law enforcement officers of the United States Government." 28 U.S.C. § 2680(h); *see generally* Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. St. Thomas L.J. 375 (2011). The law enforcement proviso would likely have allowed for an FTCA claim against the government here if the shooting had occurred completely on American soil (because Border Patrol agents are law enforcement officers). *See Millbrook* v. *United States*, 133 S. Ct. 1441, 1446 (2013).

However, claims "arising out of" assaults by non-law enforcement federal employees—who of course make up the lion's share of both the federal civil service and the armed services—are generally not actionable under the FTCA, even where they involve unjustified violence and serious physical harm or death. In those cases, too, no alternative remedy to *Bivens* exists.

2. Courts have long grappled with the scope of the "assault and battery" exception, and specifically

whether ancillary claims of federal government negligence—particularly negligent hiring or supervision claims—"aris[e] out of" an assault or battery for purposes of the exception. Drawing on this Court's decision in *Sheridan* v. *United States*, 487 U.S. 392 (1988), virtually all of the Courts of Appeals have now held that such claims are also unavailable under the FTCA. *See* Sisk, *Litigation*, § 3.6(d)(3) (collecting cases).

In *Sheridan*, an "obviously intoxicated off-duty serviceman" who had just left the Bethesda Naval Hospital following his shift as a naval medical aide "fired several rifle shots into an automobile being driven by petitioners on a public street near the ... [h]ospital." 487 U.S. at 393-394. The plaintiffs in *Sheridan* brought an FTCA claim against the United States alleging governmental negligence for allowing the servicemember to leave the hospital intoxicated and armed with a loaded rifle. *Id.* at 394. Both the district court and the Fourth Circuit held that the plaintiff's claim was barred under the assault and battery exception, but this Court reversed.

The Court held that an antecedent negligence claim may lie under the FTCA even if predicated on an intervening assault or battery. *Sheridan*, 487 U.S. at 398-399. It explained that, while a *respondeat superior* theory of government liability for an assault or battery is unavailable under the "assault and battery" exception, a claim of "Government liability that is entirely independent of" the employer-employee relationship between the Government and the tortfeasor avoids the assault and battery exception entirely. *Id.* at 401.

Thus, in *Sheridan*, an FTCA claim lied notwithstanding the assault and battery exception because the naval hospital had "voluntarily adopt[ed] regulations

that prohibit the possession of firearms on the naval base and that require all personnel to report the presence of any such firearm," and "further voluntarily undert[ook] to provide care to a person who was visibly drunk and visibly armed, ... [thereby] assum[ing] responsibility" for his actions. 487 U.S. at 401. Under these circumstances, the Government would have been liable in negligence even if the servicemember "had been an unemployed civilian patient or visitor" because liability was not predicated on the servicemember's status as a federal employee. *Id.* at 402.[8]

Sheridan expressly recognized that the FTCA does not allow *respondeat superior* claims directly premised on assault and battery. And while the *Sheridan* majority did not opine on the viability of FTCA claims alleging negligent hiring, training, or supervision of a federal employee who commits an assault or battery, a plurality of the Court insisted that negligent hiring or supervision claims are in fact barred by the assault and battery exception. *See* 487 U.S. at 406-408 (Kennedy, J., concurring in the judgment) (opining that "independent governmental negligence" is a viable theory for an FTCA claim involving an assault or battery, but that "a negligent supervision or negligent hiring claim" would be barred by the exception); *id.* at 408, 411 (O'Connor, J., dissenting) (opining that the exception applies "in any case in which the battery is essential to the claim" and urging lower courts to hold the government immune from suit in negligent hiring and supervi-

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[8] The Court noted that a direct assault or battery claim also would have fallen outside of the FTCA because the "assault and battery [had been] committed by the off-duty, inebriated enlisted man ... not acting within the scope of his office or employment." *Sheridan*, 487 U.S. at 401.

sion cases); *see also* Kratzke, *Some Recommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L.J. Am. U. 1105, 1116-1117 (1996); Massey, Note, *A Proposal to Narrow the Assault and Battery Exception to the Federal Tort Claims Act*, 82 Tex. L. Rev. 1621, 1627-1629 (2004).

Nearly every Court of Appeals has held in the years since *Sheridan* that such claims are also barred under the FTCA's assault and battery exception. *Wilburn* v. *United States*, 616 F. App'x 848, 859 (6th Cir. 2015); *Reed* v. *USPS*, 288 F. App'x 638, 640 (11th Cir. 2008) (per curiam); *CNA* v. *United States*, 535 F.3d 132, 148-150 (3d Cir. 2008); *Olsen* v. *United States ex rel. Department of Army*, 144 F. App'x 727, 733-734 (10th Cir. 2005); *Billingsley* v. *United States*, 251 F.3d 696, 698 (8th Cir. 2001) (per curiam); *Leleux* v. *United States*, 178 F.3d 750, 756 n.5, 758 (5th Cir. 1999); *Sheridan* v. *United States*, 969 F.2d 72, 75 (4th Cir. 1992); *Guccione* v. *United States*, 878 F.2d 32, 32-33 (2d Cir. 1989); *see also LM ex rel. KM* v. *United States*, 344 F.3d 695, 699-700 (7th Cir. 2003).[9]

These courts have largely adopted the view that claims against the Government that are premised on the Government's employment relationship with an employee who commits an assault and battery are cat-

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[9] The Ninth Circuit has departed from its sister circuits in holding that that "the assault and battery exception does not immunize the Government from liability for negligently hiring and supervising an employee." *Brock* v. *United States*, 64 F.3d 1421, 1425 (9th Cir. 1995). However, the Ninth Circuit has also indicated that claims challenging decisions by policy-makers on training and supervision fail on the grounds that they "fall[] squarely within the discretionary function exception" to the FTCA. *Nurse* v. *United States*, 226 F.3d 996, 1001 (9th Cir. 2000).

egorically barred. Thus, for example, in *Billingsley*, where the plaintiff alleged that the Government had negligently failed to supervise a United States Job Corps enrollee who had "struck [plaintiff] over the head with a glass bottle and kicked him repeatedly," the Eighth Circuit held that "[t]he government would not be liable ... for its negligent hiring and supervision" of the tortfeasor as that "claim pertains to the government's employment relationship." 251 F.3d at 697, 698 (citing *Leleux*, 178 F.3d at 757, and discussing the FTCA's legislative history). Or in *CNA*, an action stemming from a violent robbery by an army recruit who stole an improperly stored weapon from an army recruiter, the Third Circuit dismissed negligent supervision claims stemming from the recruiter's conduct because the claims were not "'entirely independent' of" the recruiter's "status as a government employee," and in fact "had everything to do with [the recruiter's] employment relationship with the Army." 535 F.3d at 149.[10]

In sum: There is no theory left (other than the narrow theory embraced in *Sheridan* itself) under which the victim of an act of intentional violence by a non-law enforcement federal employee may achieve a remedy under the FTCA. The FTCA thus provides no alternative to a *Bivens* claim in numerous scenarios like the

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[10] *But see* Andrews, *So the Army Hired an Ax-Murderer: The Assault and Battery Exception to the Federal Tort Claims Act Does Not Bar Suits for Negligent Hiring, Retention and Supervision*, 78 Wash. L. Rev. 161, 191-197 (2003) (arguing that "[r]espondeat superior claims, which are based on vicarious liability and are barred by the assault and battery exception, are readily distinguishable from claims based on negligent hiring, retention and supervision").

one in this case involving an alleged physical assault or battery by a government employee.[11]

III. State Tort Remedies Are Also Unavailable In Cases Like This One By Operation Of The Westfall Act

Any state law claims brought against Agent Mesa in his individual capacity would be precluded by the Westfall Act, which makes the FTCA the exclusive remedy when a personal injury claim arises from the tortious act of a federal employee acting within the scope of their employment. 28 U.S.C. § 2679(b)(1). Such claims against Agent Mesa would be precluded even though the United States is separately immune from FTCA liability under the foreign country exception to the FTCA. *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 420 (1995). As Professor Sisk has observed:

> If the federal employee is found to have acted within the scope of employment, he or she individually will be immune from liability. ... Thus, rather than expanding tort liability and enhancing the opportunity for plaintiffs to sue a financially-responsible defendant—which was

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[11] The fact that Congress saw fit to exclude claims arising in foreign countries, or founded on certain intentional torts, from the ambit of the FTCA does not weigh against allowing such claims to be asserted under *Bivens*. Indeed, such reasoning would be impossible to square with this Court's recent decision in *Simmons* v. *Himmelreich*, 136 S. Ct. 1843 (2016), where this Court held that that a *Bivens* claim could proceed even where substantively similar FTCA claims had already been dismissed pursuant to a § 2680 exception. As the Court made clear in its unanimous opinion, the FTCA's "judgment bar" provision expressly "does not apply" where a case has been dismissed pursuant to any of the exceptions. *Id.* at 1848.

> generally the intent behind state court decisions broadening the reach of *respondeat superior* in recent decades—application of liberal state scope-of-employment rules sometimes may operate to narrow tort liability in the federal employee/Federal Government context.

Sisk, *Litigation*, § 5.6(c)(4).

A. Under the Westfall Act, 28 U.S.C. § 2679, the FTCA is the exclusive remedy for torts committed by federal employees within the scope of their employment. *Id.* § 2679(b)(1). If a federal employee is sued under state law for actions that fall within the scope of their employment, the Attorney General is required to substitute the United States as the sole defendant in the case, whereupon the suit is restyled as an FTCA action and removed to federal court, while the individual employee is granted immunity for the act in question. *See id.* § 2679(c)-(d); *see also, e.g.*, *Osborn* v. *Haley*, 549 U.S. 225, 229-230 (2007).

Importantly, *Bivens* claims are expressly exempted from the Westfall Act's exclusive remedy provision. *See* 28 U.S.C. § 2679(b)(2)(A); *see also Hui* v. *Castaneda*, 559 U.S. 799, 807 (2010) (noting ("[t]he Westfall Act's explicit exception for *Bivens* claims"). But in the absence of a *Bivens* remedy, the Westfall Act may bar recovery altogether in cases like this one, where the United States is immune from suit under FTCA exceptions. *See supra* Part II.

In *Lamagno*, which involved a lawsuit by citizens of Colombia who were injured in an auto accident by a DEA agent, this Court acknowledged that under the Westfall Act, the substitution of the United States for the individual employee defendant was "unrecallable," and that once the substitution was accomplished, the

United States could be dismissed pursuant to its sovereign immunity under the foreign country exception to the FTCA. 515 U.S. at 422; *see also supra* Part I.A.1.

Accordingly, as a practical matter, once the Attorney General certifies that the alleged tortious conduct was within the scope of the tortfeasor's employment, the FTCA and *Bivens* are the only two routes to a remedy for misconduct by Government actors in myriad situations. Where, as here, FTCA claims are barred by exceptions like the foreign country exception, *Bivens* is the only remaining path. *See Lamagno*, 515 U.S. at 420 (noting that, in situations like this one, "the plaintiff may be left without a tort action against any party").

This Court addressed the Westfall Act's stark consequences recently in *Minneci*, explaining that "the potential existence of an adequate 'alternative, existing process' differs dramatically" in cases where the Westfall Act applies. 132 S. Ct. at 623. Thus, in *Minecci*, the Court held that no *Bivens* claim was available against a private employee of a federal prison who *could* be reached by state tort law, and expressly contrasted that situation with one where the defendant was a federal employee whose conduct would be covered by the Westfall Act. *Id.* (contrasting private employee scenario with *Carlson* v. *Green*, 446 U.S. 14, 16 (1980), where *Bivens* claim was available to federal prisoner).

Here, the Government has long since made its unrecallable certification that Agent Mesa was acting within the scope of his employment. There is thus no doubt that the petitioners lack a remedy in either the FTCA or in state tort law for the legal wrongs they have alleged.

Notably, Texas permits recovery in its state courts for death or personal injury in cases where the wrong-

ful act occurs in a foreign country. Tex. Civ. Prac. & Rem. Code Ann. § 71.031(a). In this case, if the suit were not converted into an FTCA action under the Westfall Act—*i.e.*, if the Westfall Act did not apply—the fact that the wrongful act took place in another country would not preclude a tort action. But the combination of the Westfall Act and the FTCA means that claims that would otherwise be cognizable in Texas state court can have no remedy except under *Bivens*.

B. The Westfall Act bars state tort-law remedies not only in this case, but in any case where a government employee defendant acted within the scope of employment under the law of the state in which the tort was committed. *E.g.*, *Bodin* v. *Vagshenian*, 462 F.3d 481, 484 (5th Cir. 2006) (citing *Williams* v. *United States*, 350 U.S. 857 (1955)). Accordingly, in states with broader *respondeat superior* liability for employers, the Westfall Act will convert a greater number of suits into FTCA actions against the Federal Government. If the Attorney General or a reviewing court finds that the employee's action was beyond the scope of employment, the suit is not converted under the Westfall Act and the plaintiff may sue the employee under state tort law. Thus, where the Federal Government is exempt from liability under one of the FTCA exceptions, a plaintiff's ability to recover damages without a *Bivens* remedy hinges entirely on whether the defendant acted within the scope of employment. *Lamagno*, 515 U.S. at 421-422.

But particularly under liberal *respondeat superior* rules in many states, plaintiffs have little chance of resisting a scope of employment certification. Here, for example, under Texas law, assault falls within the scope of employment for the purposes of *respondeat superior* where the employee is authorized to use force in the performance of his or her duties "so that the act

of using force may be in furtherance of the employer's business, making him liable even when greater force is used than is necessary." *Texas & Pac. Ry.* v. *Hagenloh*, 247 S.W.2d 236, 239 (Tex. 1952). *Respondeat superior* applies if the assault is "so connected with and immediately arising out of authorized employment tasks as to merge the task and the assaultive conduct into one indivisible tort imputed to the employer." *Buck* v. *Blum*, 130 S.W.3d 285, 289 (Tex. App. 2004).

Under that standard, and on the facts of this case, the Attorney General's determination that Mesa's actions fell within the scope of employment under Texas law—effectively precluding recovery under both state law and, because of the foreign country exception, the FTCA—would have been extremely difficult to contest.[12]

And while *respondeat superior* standards for intentional torts vary widely by state, Texas's approach is actually narrower than most—*i.e.*, under the law of most states, contesting the application of the Westfall Act would have been *even more difficult*. For example, California provides that an employee's willful, malicious, or even criminal acts may fall within the scope of employment, even if unauthorized, if they foreseeably arose from the conduct of the employer. *E.g.*, *Xue Lu* v. *Powell*, 621 F.3d 944, 948 (9th Cir. 2010).

The broader evolution of the law in this area, toward increasingly liberal *respondeat superior* rules, thus yields paradoxical results. "[O]ver time, state law

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[12] It is therefore unsurprising that petitioners "could have sought (but did not seek) federal-court review of the Attorney General's scope-of-employment certification under the Westfall Act." Pet. App. 48 (Haynes, J., concurring).

rules have tended to broaden the scope of employment concept so as to expand employer accountability to others for the misdeeds of employees." Sisk, *Litigation*, § 5.6(c)(4). But "[i]ronically—or some might say, perversely—application of these state law expectations to the peculiar Westfall Act context may have precisely the opposite effect." *Id.*

Absent an available *Bivens* claim, in situations where the federal government is immune from liability, a considerable number of tort victims in states with broad approaches to *respondeat superior* may find themselves with no remedy at all.

CONCLUSION

In addressing whether a *Bivens* claim may be asserted in this case, this Court should consider that no adequate alternative remedy exists under either the FTCA or state tort law.

Respectfully submitted.

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